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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

VOLKSWAGEN OF AMERICA, INC. and
VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ, RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recently recodified at 49 U.S.C. §§ 30101-30169), preempts a state common-law standard that conflicts with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

RULE 29.1 STATEMENT

Petitioner Volkswagen AG (sued as Volkswagenwerk Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Petitioner Volkswagen of America, Inc. is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Comercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.

Volkswagen Bruxelles S.A.
Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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PETITION FOR A WRIT OF CERTIORARI

Volkswagen of America, Inc., and Volkswagen AG (sued as Volkswagenwerk Aktiengesellschaft) (collectively Volkswagen) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arizona in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (App., *infra*, 1a-19a) is reported at 884 P.2d 183. The order of the Court of Appeals of Arizona declining to accept jurisdiction over respondent's petition for special action (App., *infra*, 20a) is unreported. The minute entry order of the Superior Court for Pima County, Arizona granting petitioners' motion for partial summary judgment (App., *infra*, 21a-22a) is unreported.

JURISDICTION

The decision and mandate of the Supreme Court of Arizona were entered on November 1, 1994 (App., *infra*, 1a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act (Safety Act or Act), as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. § 1392

(a) Establishment

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * * * *

(d) Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section

shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * * *

15 U.S.C. § 1397

* * * * *

(k) Continuation of common law liability

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in pertinent part, are as follows:

49 U.S.C. § 30103. Relationship to other laws

(b) Preemption.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * * *

(e) Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

STATEMENT

Invoking the Eleventh Circuit's decision in *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (11th Cir.), cert. granted, 115 S. Ct. 306 (1994) (No. 94-286), the Supreme Court of Arizona held in this case that the National Traffic and Motor Vehicle Safety Act does not preempt state common-law standards that conflict with Federal Motor Vehicle Safety Standards (FMVSS). This petition asks the Court to hold the case for review pending the disposition of *Myrick*, which raises virtually the same issues concerning the preemptive scope and effect of the Safety Act and FMVSSs on state common-law standards.

A. The Safety Act and FMVSS 208

Under the Safety Act, the National Highway Traffic Safety Administration (NHTSA), an agency within the Department of Transportation, promulgates safety standards for motor vehicles. 15 U.S.C. § 1392.[1] The Act mandates national uniformity in FMVSSs (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect,

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[1] For ease of reference we cite to the prior codification of the Safety Act, which was cited in the opinions and orders below.

> no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

A later provision of the statute adds a so-called "savings" clause: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).[2]

In explaining the need to preempt state law, the Senate Report on the Safety Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Thus, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12, 1966 U.S.C.C.A.N. at 2712, 2720. As President Johnson remarked, the "alternative is unthinkable—50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

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[2] Although referred to as a "savings" clause by the court below (App., *infra*, 8a), this provision is not and was not intended to function as a true savings clause. See pages 17-19, *infra*; see also Brief of *Amicus Curiae* Product Liability Advisory Council, Inc., *Freightliner Corp. v. Myrick*, No. 94-286, at 15-23.

In exercising its authority under the Safety Act, NHTSA has promulgated numerous standards dealing with vehicle design and performance. At issue in this case is FMVSS 208, which addresses the "performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1. In particular, for passenger cars manufactured between September 1, 1973 and September 1, 1986, FMVSS 208 provided three designated design "options" for safety restraint systems, as well as performance requirements for each option:

1. Complete passive protection for all crashes (S4.1.2.1);
2. Passive restraints for head-on crashes (S4-.1.2.2); or
3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave a manufacturer the right to choose any one of these options for its vehicles.

The second option available under FMVSS 208 protects vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[3] Indeed, the regulations expressly pro-

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[3] The second option in FMVSS 208 for passenger cars manufactured between September 1, 1973 and September 1, 1986 reads in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of

vide a fourth option: "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could choose to comply with FMVSS 208 by installing passive seat belts that met the performance requirements of any of the designated restraint system options with no manually activated seat belts at all.

B. Factual and Procedural Background

Respondent Amparo Hernandez-Gomez was seriously injured when the 1981 Volkswagen Rabbit in which she was a passenger veered off the road, struck a drainage ditch, flipped over, and landed on its roof. App., *infra*, 2a. Respondent suffered a spinal cord injury that has rendered her a paraplegic. *Ibid.*

Respondent filed suit against Volkswagen in Arizona Superior Court alleging, among other things, that the "safety restraint system" in the Rabbit was negligently designed and manufactured and "failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries." App., *infra*, 2a. The safety restraint system in the vehicle "consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut,

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S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

See also 49 C.F.R. § 571.208, S4.5.3.

a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision." *Ibid.* "Because it was designed to be fully automated, the system did not include a manual lap belt." *Ibid.* Respondent alleged that the absence of a manually activated lap belt made the vehicle defective and unreasonably dangerous. *Ibid.*

Volkswagen moved for partial summary judgment, contending that the passive restraint system in the Rabbit met the requirements for the second design option in FMVSS 208. The Superior Court agreed, concluding that the vehicle's passive restraint system "complied with the Federal Motor Vehicle Safety Standards, particularly FMVSS 208 and 209" and that therefore respondent's "common law claim attempting to impose civil liability on [Volkswagen] based solely on the failure to provide a lap belt is impliedly preempted" by the Safety Act and NHTSA regulations. App., *infra*, 21a.

The Arizona Court of Appeals declined jurisdiction over respondent's petition for "special action" to review the trial court's order. App., *infra*, 20a. The Arizona Supreme Court then granted review to consider "whether an automobile manufacturer can be liable under state tort law for a product design defect when that design meets Safety Act standards." *Id.* at 3a.

C. The Arizona Supreme Court's Decision

The Arizona Supreme Court sitting en banc reversed the Superior Court's order granting Volkswagen's motion for summary judgment. The court assumed for purposes of its decision that the passive restraint system in the 1981 Volkswagen Rabbit complied fully with the second option in FMVSS 208 for passenger cars manufactured between 1973 and 1986.

App., *infra*, 7a. The court nonetheless held that the Safety Act neither expressly nor impliedly preempted state common-law standards that conflict with FMVSS 208.

Construing the preemption and "savings" clauses of the Safety Act, the Arizona Supreme Court found the statutory text "quite clear." App., *infra*, 9a. "State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually the two provisions have clear and unambiguous meaning. Further we *presume* against preemption of state common-law and refuse to find preemption absent an explicit textual statement of legislative intent." *Ibid.* Thus, the court concluded that the tort claim in this case was "expressly not preempted." *Ibid.*

In addition, the Arizona Supreme Court declined to follow the long line of federal circuit court decisions finding that FMVSS 208 impliedly preempted "state common-law tort claims against carmakers for not installing airbags in their cars." App., *infra*, 10a.[4] The court acknowledged that, in light of these

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[4] Citing *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of State appellate courts reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 800 (Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (N.Y. 1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

decisions, it "might have been constrained to * * * find implied preemption of a class of state common-law actions, notwithstanding our reading of the text and consequent reluctance to do so." The court avoided that result, however, by focusing on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), which it interpreted to "cast[] an entirely different light on the issue of pre-emption." App., *infra*, 11a.

According to the Arizona Supreme Court, "*Cipollone* changed federal preemption analysis by limiting the preemptive reach of a federal statute to its express terms." App., *infra*, 11a-12a. The court relied for this remarkable conclusion on a short passage from *Cipollone* stating that

> "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions."

Id. at 12a (quoting *Cipollone*, 112 S. Ct. at 2618 (citations and quotation marks omitted)). The court below read this statement to "limit[] preemption analysis to the express statutory language." App., *infra*, 12a. Thus, "courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent." *Ibid.*

In so construing *Cipollone*, the Arizona Supreme Court expressly relied on the Eleventh Circuit's decision defining the scope of Safety Act preemption in *Myrick*, 13 F.3d at 1522. See App., *infra*, 12a-13a.

The court below held that the Eleventh Circuit had correctly applied " '*Cipollone*'s clear instruction that when there is an express preemption provision we should not consider implied pre-emption.' " *Id.* at 15a (quoting *Myrick*, 13 F.3d at 1522).

Finally, in reversing the trial court's order entering partial summary judgment for Volkswagen, the Arizona Supreme Court concluded that "*Cipollone* requires this result and [we] are secure in the knowledge that our construction of this federal statute is not the last word." App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

By following the Eleventh Circuit's decision in *Myrick*, the Arizona Supreme Court has perpetuated the *Myrick* court's subversion of federal preemption law. First, the court below, like the Eleventh Circuit in *Myrick*, erroneously held that the Safety Act does not expressly preempt state common-law standards that conflict with a FMVSS. Second, the court below, like the Eleventh Circuit in *Myrick*, misinterpreted this Court's decision in *Cipollone* to mandate that there can be no implied preemption of state law when a federal statute contains an express preemption clause.

These rulings are plainly wrong. At the time respondent's automobile was manufactured, FMVSS 208 gave Volkswagen the option to install fully passive automatic safety belts with no manually activated lap belts. As the Solicitor General explained in his *amicus curiae* brief in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065 (1989), the Secretary of Transportation sought to "promote motor vehicle safety" through FMVSS 208 by "affirmatively * * * encourag[ing] manufacturers to use a *variety* of protection systems in their fleets."

U.S. Br. 12, 15 (emphasis in original). Such diversity was intended to "ensur[e] public acceptance of passive protection systems," "encourag[e] the development of new and improved technologies," and "enabl[e] [NHTSA] to acquire a more extensive data base upon which future regulatory decisions could be made." *Id.* at 12-13. Thus, FMVSS 208 was consciously designed to give manufacturers a choice among various passive restraint system designs, rather than to mandate one particular system.

In this case, as the trial judge found and the Arizona Supreme Court assumed, Volkswagen fully complied with FMVSS 208 by invoking option two, providing for passive safety restraints without a manual lap belt. See App., *infra*, 7a, 21a; see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). Indeed, in 1974, NHTSA expressly determined that Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manually activated seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834 (1974). Since then, a long line of Secretaries of Transportation has approved (and lauded) the use of the automatic seat belt design in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).[5]

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[5] In early 1977, the Department of Transportation contracted with Volkswagen to manufacture 125,000 cars equipped

Respondents, however, seek to impose a state law standard on petiitoners that would *require* manually activated lap belts. This claim is plainly preempted because it is inconsistent with the optional approach taken in FMVSS 208 and would disrupt the federal government's considered policy by removing or restricting an option granted by federal law. See *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); Brief for the United States As *Amicus Curiae*, *Freightliner Corp.* v. *Myrick*, No. 94-286, at 28-29 ("Interference with that federally protected freedom of choice through state tort judgments would have conflicted with Standard 208"). Moreover, this proposed common-law standard would penalize use of a passive restraint system that was expressly approved and encouraged by NHTSA and the Department of Transportation.

Because the Arizona Supreme Court has decided an important issue of federal law in a way that conflicts with the rulings of numerous other federal and state appellate courts (see note 4, *supra*), its decision would normally warrant plenary review. However, because this Court already has agreed to review the Eleventh Circuit's decision in *Myrick*, which (although involving a different FMVSS) is infected by many of the same errors, we suggest that the Court defer consideration of this petition and dispose of it as appropriate in light of the decision in *Myrick*.

1. The Arizona Supreme Court refused to find implied preemption because of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision pro-

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with the system in a "demonstration program to exhibit the effectiveness of passive restraint systems." 42 Fed. Reg. 5071, 5071 (1977).

vides a 'reliable indicium of congressional intent with respect to state authority,' * * * 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618 (citations omitted). The court below broadly interpreted this sentence to mean that the implied preemption doctrine is no longer applicable to statutes with express preemption clauses. App., *infra*, 12a-15a.

This holding cannot be reconciled with this Court's precedents. As a threshold matter, it is implausible that in one sentence the *Cipollone* Court intended to repudiate a long line of preemption decisions permitting (indeed, accepting) implied preemption arguments regarding statutes with express preemption clauses. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977).[6] Indeed, the Arizona Supreme Court's interpretation is contrary to this Court's decisions rendered both before and after *Cipollone*. See *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992); *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732 (1993); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

A careful reading of *Cipollone* reveals that implied preemption has *not* been abolished in *all* cases in-

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[6] The Arizona Supreme Court's interpretation of *Cipollone* is also at odds with the proposition that state laws conflicting with federal law are preempted "by direct operation of the Supremacy Clause," *i.e.*, without regard to whether the federal statute or regulation has a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). By the same token, no presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

volving a federal statute with an express preemption clause. Instead, *Cipollone* stands merely for the unremarkable proposition that because congressional intent is the touchstone of preemption analysis, implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congresional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (citation omitted).[7]

For three reasons that were rejected without serious analysis by the court below, the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. First, 15 U.S.C. 1392(d) does not purport to be an exhaustive description of the state authority that Congress meant to displace. Notably, this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress, it is unreasonable to expect a statutory express preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

Second, the Safety Act's preemption section does not provide a "reliable indicium" of Congress's preemptive intent because it does not reflect all of the

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[7] Indeed, the "reliable indicium" formulation predates *Cipollone*, having been used by this Court in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1982), and *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978). This confirms that *Cipollone* did not change preemption law as the Arizona Supreme Court concluded.

available evidence of Congress's thinking. Section 1397(k) of the Act, for example, which provides that compliance with a safety standard "does not exempt any person from liability under common law," shows that Congress expected implied preemption to operate under the Safety Act. The section was added, in part, to prevent implied *field* preemption from entirely displacing state law, but Congress did not save state law claims from implied *conflict* preemption. See pages 19-20, *infra*.

Finally, a recent amendment to the Safety Act provides further evidence that the Arizona Supreme Court's conclusion on congressional intent is wrong. In reauthorizing the Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install such passive restraints were impliedly preempted and that an "all airbag" amendment might be construed as disturbing those precedents. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d), 105 Stat. 1914, 2086 (1991). See H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. This legislation and its history show conclusively that Congress was aware of, and content with, the cases construing the Safety Act to allow implied preemption analysis in passive restraint litigation.

2. The Arizona Supreme Court's rejection of express preemption (App., *infra*, 9a, 17a-18a) is similarly inconsistent with many decisions of this Court. The court below held that common law claims did not fall within the preemption provision of the Safety Act because Congress failed to make explicit reference to state common law. App., *infra*, 17a n.17 ("the absence of a reference to common-law claims indicates that Congress did *not* intend preemption") (emphasis in original). This rationale was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of " 'requirement[s] or prohibition[s] * * * imposed under State law.' " See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer to common law claims. See also *Easterwood*, 113 S. Ct. at 1737-1738.

In finding no express preemption, the Arizona Supreme Court also relied (App., *infra*, 17a) on the Safety Act's so-called "savings" clause, 15 U.S.C. 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law"); see note 2, *supra*. The court held that this clause "explicitly shelters common-law claims from preemption." App., *infra*, 17a.

The title, text, structure, and legislative history of the "savings" clause demonstrate, however, that it was not intended by Congress to restrict the scope of express preemption. Instead, the narrow language of Section 1397(k), which refers to "[c]ompliance with any Federal motor vehicle safety standard," negates only an affirmative common-law defense of compliance

with a government standard. See generally Brief of *Amicus Curiae* Product Liability Advisory Council, Inc., *Freightliner Corp.* v. *Myrick*, No. 94-286, at 15-23 (discussing legislative history and background of Section 1397(k)).[8]

Moreover, the text of Section 1397(k) differs significantly from the language used by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of preemption. In the preemption section of the Safety Act, for example, Congress included two true savings clauses limiting the reach of federal preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphasis added). Each of these clauses begins with the unambiguous and traditional saving language, "Nothing in this section shall be construed * * *." The savings clauses in virtually every other case decided by this Court have similar encom-

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[8] Section 1397(k) is not included in the Safety Act's preemption provision, Section 1392(d), but is located five sections later. While the title of the preemption provision is "Supremacy of Federal standards," the title of Section 1397(k) is "Continuation of common law liability," which makes no reference to preemption or federal supremacy.

passing language and not the narrow "compliance with" language of Section 1397(k).[9]

Finally, even if Section 1397(k) were a true savings clause, the court below nevertheless erred because it ignored this Court's precedents interpreting similar clauses in other statutes. This Court has consistently interpreted such clauses as indicating only Congress's intent to allow common law claims to proceed in areas *not* covered by federal regulation. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Contrary to the Arizona Supreme Court's holding, the same interpretation should apply to Section 1397(k).

In particular, this Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions to subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446

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[9] See, *e.g.*, *John Hancock Mut. Life Ins. Co.*, 114 S. Ct. at 525 (interpreting savings clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992) (interpreting savings clause of Federal Aviation Act, 49 U.S.C. § 1506, which states, "[n]othing * * * in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies"); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting savings clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "[t]he provisions of this Act * * * shall not be held to exempt or relieve any person from any liability * * * provided by any present or future law of * * * any State * * *").

(1907), for example, the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*; see also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-95 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986). Here, too, it would be perverse to attribute to Congress the intent to "save" common law claims that "would have frustrated the Secretary's policy judgment and would have an adverse effect on safety" (*Myrick* U.S. Br. 28).

3. Both the express and implied preemption issues decided by the Arizona Supreme Court—erroneously and in conflict with other courts—should be resolved by this Court in *Myrick* later this Term. Petitioners therefore respectfully request that this case be held for review following the disposition of these issues in *Myrick*. In the event that the Court rejects the reasoning of the Eleventh Circuit in *Myrick*,[10] the judg-

[10] In *Myrick*, the Court will consider the preemptive scope of FMVSS 121, which grants manufacturers an option whether to install antilock brakes on their trucks and trailers. The government has asserted in that case, however, that FMVSS 121 does not grant such an option, and it contrasts that standard with FMVSS 208, which it acknowledges expressly grants safety restraint options to manufacturers and preempts common-law claims. *Myrick* U.S. Br. 24-29. Should the Court in *Myrick* reject the Eleventh Circuit's flawed preemption analysis but affirm the judgment on the grounds suggested by the government—that FMVSS 121 does not grant a safety

ment in this case should be reversed and the case remanded for further consideration in light of the Court's decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Freightliner Corp.* v. *Myrick*, No. 94-286.

Respectfully submitted.

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option and therefore does not conflict with state common-law claims—the judgment in this case should nevertheless be reversed in light of the differences between FMVSS 121 and FMVSS 208, which are conceded by the government.

APPENDICES

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APPENDIX A

[Filed Nov. 1, 1994]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

Supreme Court No. CV-93-0202-PR

Court of Appeals No. 2 CA-SA 93-0046

Pima County No. 274471

AMPARO HERNANDEZ-GOMEZ,
Petitioner,

vs.

HON. JOHN S. LEONARDO, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima,
Respondent,

VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION, AND VOLKSWAGENWERK AKTIENGESELLSCHAFT, A FOREIGN CORPORATION,
Real Parties in Interest.

Special Action from the Superior Court in Pima County
The Honorable John S. Leonardo, Judge

REVERSED AND REMANDED

OPINION

FELDMAN, Chief Justice

The court of appeals denied special action relief in this case and we granted review to consider an issue of first impression in this state: Does the National Traffic and

Motor Vehicle Safety Act (the Safety Act) preempt a state law tort action against a car manufacturer that did not incorporate a lap belt in its passive restraint system?

We have jurisdiction under Ariz. Const. art. 6, § 5(3) and Ariz. R. P. Spec. Act. 8.

FACTS AND PROCEDURAL HISTORY

The operative facts are few and undisputed. On November 6, 1989, Amparo Hernandez-Gomez (Plaintiff) was riding in the right front seat of a 1981 Volkswagen Rabbit when the driver briefly took his eyes off the road. Travelling between 30 and 35 miles per hour, the car veered off the road and ran down an embankment. It struck a drainage culvert, flipped over, and landed on its roof. Plaintiff's head and shoulders smashed against the car's roof causing a spinal cord injury that has left her paraplegic.

Plaintiff alleges that the design of the car's safety restraint system failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries. The restraint system consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. Because it was designed to be fully automated, the system did not include a manual lap belt that arguably would have prevented Plaintiff from being thrown against the roof of the car. Plaintiff claims that the absence of a lap belt made the car defective and unreasonably dangerous to its occupants.

On January 15, 1993, Volkswagen of America and Volkswagenwerk Aktiengesellschaft (collectively VW) moved for partial summary judgment, arguing that the car's passive restraint system [1] complied with federal de-

[1] A passive restraint system protects the occupant "by means that require no action by vehicle occupants . . . ." 49 C.F.R. § 571.208 S4.1.2.2(b) (1988).

sign and performance standards, which required no lap belt. So finding, and concluding that the Safety Act pre-empted state tort law so that compliance with the Act insulated the manufacturer from common-law liability, the trial judge granted partial summary judgment in VW's favor on March 16, 1993.

Seeking relief from the trial court's order, Plaintiff brought a special action [2] before the court of appeals, which declined jurisdiction on April 20, 1993. This court then accepted review of the following issues:

> 1. Whether the trial court incorrectly interpreted and applied the principles of federal preemption set forth in the recent U.S. Supreme Court case of *Cipollone* so as to abrogate Plaintiff's right to bring an action to recover damages for injuries resulting from negligent and/or defective design.
>
> 2. Whether common law product liability actions brought in Arizona are preempted by the Safety Act or [Federal Motor Vehicle Safety Standards].

The fundamental question is whether an automobile manufacturer can be liable under state tort law for a product design defect when that design meets Safety Act standards.

DISCUSSION

A. The Safety Act and Its Standards

Congress passed the Safety Act (15 U.S.C. § 1381 *et seq.*) in 1966 "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." [3] Congress authorized the Secretary of Transportation to formulate safety standards to protect the motoring public against an unreasonable risk of injury due to "the design,

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[2] In Arizona, relief formerly obtained by writs of prohibition, mandamus, or certiorari is now obtained by "special action." Ariz. R. P. Spec. Act. 1.

[3] Former 15 U.S.C. § 1381.

construction or performance of motor vehicles . . . ." [4] The Secretary of Transportation delegated the duty of writing Federal Motor Vehicle Safety Standards to the National Highway Transportation Safety Administration (Safety Administration). 49 C.F.R. § 571.2. The federal safety standards appear at 49 C.F.R. §§ 571.1 to 571.302.

The relevant safety standards are "Occupant Crash Protection," 49 C.F.R. § 571.208 (Standard 208), and "Seat Belt Assemblies," 49 C.F.R. § 571.209. Since the inception of these standards, there has been a national controversy on the question of whether passive restraints such as airbags should be mandatory or optional. Standard 208 originally required nothing more than seatbelts in newly manufactured automobiles. The United States Supreme Court cited 32 Fed. Reg. 2415 as the primary source. *Motor Vehicle Mfgrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 34, 103 S. Ct. 2856, 2862 (1983). Responding to sporadic seatbelt use by the public and a high rate of traffic injuries and fatalities, in 1969 the Department of Transportation began requiring installation of passive restraints in new cars. *Id.* at 35, 103 S. Ct. at 2862.

The Safety Administration reviewed two kinds of passive restraint crash protection systems—airbags and automatic seatbelts. Keith C. Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L. J. 897, 902 (1988). Over the next fifteen years, other passive restraint systems were proposed and rejected due to their unpopularity with the public or carmakers. In addition, changes in administrations and national priorities during these years brought a number of successors with different agendas to the position of Secretary of Transportation. As a result, about sixty rulemaking notices were issued that "imposed, amended, rescinded, reimposed, and now rescinded again" the requirement for car manufacturers

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[4] Former 15 U.S.C. § 1391(1). *See* text.

to install passive restraints. *Motor Vehicle Mfrs.*, 463 U.S. at 34, 103 S. Ct. at 2862.[5]

In effect since 1973, Standard 208 allowed manufacturers to choose one of three options for cars made between 1973 and 1986. Passive protection need not be by airbag but must meet specific Standard 208 criteria. By giving carmakers a choice of safety restraint options. Congress hoped to stimulate research, development, and competition. S. Rep. No. 1301, 89th Cong., 2d Sess. 1, 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712. The element of choice is considered a central feature of the Safety Act's regulatory scheme. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (3d Cir.), *cert. denied*, 498 U.S. 853, 111 S. Ct. 147 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990).

The industry's reluctance to install airbags has led to numerous lawsuits against carmakers by people injured in automobiles not equipped with airbags. *See, e.g., Wood v. General Motors Corp.*, 865 F.2d 395, 400 (1st Cir. 1988) ("In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive [airbag] restraints."), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990). The issue in those cases—whether, in light of the Safety Act options permitting but not requiring airbags, a manufacturer can be liable in a common-law action for not installing an airbag—parallels

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[5] The issue in *Motor Vehicle Mfrs.* concerned whether the Safety Administration's rescission of the passive restraint requirement was arbitrary and capricious and violated the Safety Act. By failing to consider an airbag-only option, the Court suspected the agency was acquiescing to an industry preference for the automatic seatbelt design. 463 U.S. at 49, 103 S. Ct. at 2870. Finding that the purpose of the Safety Act was to arouse an automobile industry inert to safety concerns, the Court remanded for the agency's reconsideration. *Id.* at 57, 103 S. Ct. at 2874.

the issue here. In the present case, instead of an airbag claim, Plaintiff sued the carmaker for failing to install a lap belt even though the Safety Act allegedly permitted the option of a two-point passive restraint system without a manual lap belt. We recognize, as did the Supreme Court and the Safety Administration, that airbags and three-point seatbelts significantly reduce traffic accident injuries and fatalities.[6]

B. The Car's Crash Protection System—Compliance with Standards

For this 1981 model car, VW attempted to comply with one of the available options by designing a belt-type passive restraint system for the front-seat occupants. The design used an automatic two-point shoulder belt with no lap belt. In its motion for summary judgment, VW offered evidence that this restraint system satisfied Standard 208 and that a lap belt was not required to comply with option two. Finding that Plaintiff did not produce evidence sufficient to raise a genuine issue of material fact on the question of compliance, the trial judge held that the car's passive restraint system satisfied Standard 208. The court concluded, therefore, that the Safety Act preempted Plaintiff's claim and granted VW's motion for summary judgment.[7]

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[6] *Motor Vehicle Mfrs.*, 463 U.S. at 34-35, 103 S. Ct. at 2862; United States Department of Transportation, National Safety Belt Usage Program, *Progress and Assessment Report on the National Safety Belt Usage Program* 2 (Sept. 1983) (estimating that lap belt use could reduce fatalities and serious injuries by 50 to 60 percent each year).

[7] An identical claim was made against VW in *O'Bryan v. Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992). Based on the Safety Administration's interpretations of its requirements, the district court in *O'Bryan* similarly found that VW's two-point passive restraint system met the requirements of Standard 208's option two and that the federal standard preempted state law damage claims. *Id.* at 324.

For purposes of this opinion, we assume that the trial judge correctly decided that the design in question complied with option two. Thus we address only the preemption issue.

C. Preemption and Savings Clauses and Federal Preemption Doctrine

When this court accepted jurisdiction, the relevant sections of the Safety Act appeared at 15 U.S.C. § 1392(d) (1994 supp.) (preemption clause) and § 1397(k) (1994 supp.) (savings clause). Congress revised the language and recodified these subsections at 49 U.S.C. § 30103(b) and (e), respectively, effective July 5, 1994. Because the parties' briefs referred to the prior sections and language, we use those citations. The original preemption clause provided in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, *no State or political subdivision of a State shall have any authority either to establish, or to continue in effect,* with respect to any motor vehicle or item of motor vehicle equipment *any safety standard applicable to the same aspect of performance* of such vehicle or item of equipment *which is not identical to the Federal standard.* Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

15 U.S.C. § 1392(d) (1992 supp.) (emphasis added).[8]

[8] We note two obvious effects of the revised language in 49 U.S.C. § 30103(b). First, whereas the old provision was phrased to prohibit states from continuing or enacting nonidentical regulatory standards, the new provision permits states to enact standards only if they are identical to the federal standards. And second, subordinate clauses have been rearranged in the new preemption clause to make the text more readable. We do not consider these changes substantively significant.

The applicable savings clause provided:

> Continuation of common law liability
>
> *Compliance* with any Federal motor vehicle safety standard issued under this subchapter *does not exempt any person from any liability under common law.*[9]

15 U.S.C. § 1397(k) (1992 supp.) (emphasis added).

The Supremacy Clause allows Congress to make laws that supersede state law.[10] Federal regulations may also preempt state law. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375 (1985). In determining whether a federal law preempts a state's statute, the "sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 689 (1987). However, there is a strong presumption against preemption of a state's police power. *Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608, 2617 (1992). Preemption analysis:

> [S]tart[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessar-

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[9] Because federal doctrine generally avoids establishing a federal common law, we take the phrase "common law" in the 1966 statute as a reference to state common law. *See Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067 (1981) (noting that there is no federal common law except in a "few and restricted" instances.).

[10] U.S. Const. art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> ily by the courts. But when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Jones v. Rath Packaging Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977) (citations and quotes omitted).

Whenever possible we must divine intent from statutory text. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) ("The language of a statute is the most reliable evidence of its intent, and in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."). The text seems quite clear. Obviously, the preemption and savings clauses must be construed together. State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually, the two provisions have a clear and unambiguous meaning. Further, we presume against preemption of state common-law and refuse to find preemption absent an explicit textual statement of legislative intent. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 273, 872 P.2d 668, 677 (1994) (Arizona statute does not preempt state court jurisdiction over bad faith claims against workers' compensation carriers). Were we writing on a clean slate in 1966—before other courts began strirring the waters of the Safety Act's preemptive reach—we would find the claims asserted in this case expressly *not* preempted and would effectively end the opinion at this point.

However, unlike *Hayes*, we deal not with a state statute but with an act of Congress. Thus, federal rather than state law must govern. Further, this is 1994 and we do not write on a clean slate. Since 1966, many courts have considered preemption under the Safety Act, often find-

ing preemption on the issue before us. Although the United States Supreme Court has not decided the issue and we therefore are not constrained by binding authority, respect for federal circuit opinions interpreting a federal statute obviously compels us to consult federal authority.

Notwithstanding the language of the savings clause, a number of federal courts have found *implied preemption* of state common-law tort claims against carmakers for not installing airbags in their cars. They found the Safety Act's preemption clause ambiguous because it did not expressly place such claims outside preemptive reach. *Wood*, 865 F.2d at 412.[11] The courts determined that a state law damage award could effectively establish a standard not identical to the federal standard for the same feature and thus thwart the intended flexibility of the options allowed by Standard 208. These no-airbag claims would conflict with congressional intent to give manufacturers a choice of restraint system designs. *Taylor*, 875 P.2d at 827 ("[A] state common law rule . . . would, in effect, remove the element of choice authorized in Safety Standard 208 [and] would frustrate the federal regulatory scheme."); *see also Pokorny*, 902 F.2d at 1123; *Wood*, 865 F.2d at 408.

Each of these courts concluded that the Savings Clause does not preserve common law damage actions that would subvert federal objectives and methods. One district judge concluded that "courts have declared, almost with one voice, that the Safety Act *impliedly* preempts [conflicting common-law] liabiliity, *even though its express preemption clause may be insufficient to accomplish the task.*" *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 896 (W.D.

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[11] *See also Pokorny*, 902 F.2d at 1126; *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990); *Taylor*, 875 F.2d at 827. Cf. *Perry v. Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (implied preemption only where there is an actual *conflict* with the "objectives and methods of the federal scheme").

Ky. 1993) (first emphasis in original; second emphasis added).

Thus, consulting federal decisions in the years following enactment of the Safety Act, we might have been constrained to adopt the view of the federal courts and find implied preemption of a class of state common-law actions, notwithstanding our reading of the text and consequent reluctance to do so. *Hayes*, 178 Ariz. at 273, 872 P.2d at 677. However, the Supreme Court decision in *Cipollone* casts an entirely different light on the issue of preemption.

In *Cipollone*, the plaintiff sued a cigarette manufacturer for wrongful death of his mother. He claimed that the manufacturer breached express warranties contained in advertising, failed to warn consumers about the hazards of cigarette smoking, fraudulently misrepresented the hazards of smoking, and conspired to withhold from the public medical information about smoking. 112 S. Ct. at 2613. The Court considered whether these claims could survive the Federal Cigarette Labeling and Advertising Act of 1965,[12] which required a specific and conspicuous health warning on all cigarette packages sold in this country. The question at issue was essentially that presented in this case: Did that Act's preemption provision—barring states from imposing other warning requirements related to advertising or promoting cigarettes—bar the plaintiff's common-law tort claims?

The Supreme Court partly reversed the lower court's ruling that the Labeling Act preempted the state law claims. *Id.* at 2625. Finding that the preemptive scope of the Labeling Act is governed entirely by its express language, the Court held that the preemption provision only prohibits state lawmakers from mandating particular warning labels. *Cipollone* changed federal preemption

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[12] This act was succeeded by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340.

analysis by limiting the preemptive reach of a federal statute to its express terms:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions . . . . Therefore, we need only identify the domain expressly preempted by each of these sections.

Id. at 2618 (citations and quotes omitted). *Cipollone* thus limited preemption analysis to the express statutory language by holding that a correlative federal regulatory requirement "does not by its own effect foreclose additional obligations imposed under state law." *Id.* In short, courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent.

In the wake of *Cipollone*, courts have narrowed their evaluation of a statute's preemptive reach. Almost all the federal circuits have addressed federal preemption since *Cipollone* and now consider expression of preemption in a statute's text the "reliable indicium of congressional intent," no longer divining implied preemption. *See Myrick v. Fruehauf Corp.*, 13 F.3d 1516, 1522 (11th Cir. 1994) (citing cases[13] following *Cipollone*'s instruction that preemption analysis should be limited to the

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[13] *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 345, 358 (8th Cir. 1993); *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 86 (1993); *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

"domain expressly pre-empted by each of those sections"), *cert. granted*, 63 U.S.L.W. 3291 (U.S. Oct. 11, 1994) (No. 94-286).

Significantly, since *Cipollone*, at least one circuit court has reevaluated its previous holding. In *Taylor*, a pre-*Cipollone* case acknowledging no express common-law preemption, the Eleventh Circuit held that a common-law tort claim based on a defect in a design complying with the Safety Act's standards was impliedly barred. After *Cipollone* a different panel of the same court ruled to the contrary in *Myrick*, a case concerning a liability claim against truck and trailer manufacturers for failing to install anti-lock brakes. 13 F.3d at 1521-22. Finding the plaintiffs' tort claims not expressly preempted by the Safety Act's preemption clause and expressly protected by the savings clause, *Myrick* partly overruled *Taylor* by following "*Cipollone*'s clear instruction that when there is an express preemption provision we should not consider implied pre-emption . . . ." *Id.* at 1522. At least one state appellate court has followed *Myrick*'s lead by finding no preemption of an airbag liability claim. *Loulos v. Dick Smith Ford Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994), *transfer denied* (the savings clause is a reliable indicium of congressional intent to save a common-law airbag claim).

Not all post-*Cipollone* no-airbag cases agree that these claims survive. One federal district court stated that:

> The mere presence of express preemption language does not necessarily prohibit an implied preemption analysis under the *Cipollone* rule . . . . A court may . . . search a statute for implied preemptive intent if that statute's express language fails to provide a "reliable indicium" of the legislature's preemptive wishes.

Gills, 829 F. Supp. at 897-98 (citations omitted). Finding that a common-law claim could have a conflicting

regulatory effect if it would establish a state safety standard different from the federal standard but covering the same aspect of performance, the court granted partial summary judgment for the defendant carmaker on the grounds that the Safety Act had impliedly preempted the airbag claim because such a claim would interfere with the manufacturer's approved options. *Id.* at 899. The court, however, distinguished airbag claims from common-law claims "that a safety device [presumably including a seatbelt assembly], though in compliance with minimum federal standards, failed to meet higher performance requirements." *Id.* Although a claim based on the absence of an airbag would effectively reduce a carmaker's choice of Standard 208 options, a claim based on a defective though federally approved design would not. The latter claim would force the carmaker to either satisfy a higher standard for its system design or face the risk of damages claims, a result not necessarily in conflict with the inherent flexibility of the Safety Act.[14]

Another district court has concluded that the preemption clause "*expressly* preempt[s] all state tort claims that are 'applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.'" *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574, 577 (D. Colo. 1994) (emphasis added). On the other hand, the court held that the "savings clause does not express any specific congressional intent to preserve state common law actions" that effectively circumvent the preemption clause. *Id.* With all due respect, the district judge seems to suggest that Congress could not have meant what it said when in the savings clause it stated that compliance would "not exempt any persons from any liability under common law."

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[14] Presumably *Gills'* rationale would not recognize preemption of the claim asserted in the present case.

Like those pre-*Cipollone* opinions that ignored the explicit language of federal statutes while searching for unarticulated congressional motives, we believe the district court analyses in *Gills* and *Montag* are incorrect. *Cipollone* commands courts to follow a textual path in ascertaining a statute's meaning, making it unnecessary either to search for unarticulated legislative intent or engage in a balancing process that may result in a conclusion of implied preemption. As we read Justice Stevens' words in *Cipollone*, in which Congress addressed the preemption question, as in the Safety Act, preemptive reach is determined not by a search for unexpressed congressional intent but by the words of the text itself. Thus, the text provides "the reliable indicium of congressional intent" to preempt state authority. *Cipollone*, 112 S. Ct. at 2618. The application of that rule ends the "need to infer congressional intent to preempt state laws from the [other] substantive provision[s]" of the legislation. *Id.*; *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."). Thus, when the statute addresses pre-emption, its text defines preemptive reach and "implies that matters beyond that reach are not preempted." *Cipollone*, 112 S. Ct. at 2618.

For what it is worth, we believe that this rule is by far the best policy. If a legislative body wishes to pre-empt, it knows the language that will accomplish that result. *Taylor*, 875 F.2d at 824.[15] "If the legislature

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[15] As noted in *Taylor*, 875 F.2d at 824, examples of federal acts in which common-law claims are expressly preempted include the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715a-17(d), -18(a) (1989) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (1982) (preempting rights "under the common law or statutes of any State,"

seeks to preempt a cause of action or to deprive the courts of jurisdiction, the law's text . . . should say so explicitly." *Hayes*, 178 Ariz. at 273, 872 P.2d at 677. Such a rule transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled *before* the statute is passed. *Id.*

D. Resolution

With the *Cipollone* rule in mind, we turn to the preemption issue before us. We find the Safety Act's text clear enough. The preemption clause itself indicates that Congress considered the issue of preemption. The text expressly precludes any state from establishing, or prescribing, a safety standard not identical to the same aspect of performance targeted by a federal standard. 15 U.S.C. § 1392(d), now 49 U.S.C. § 30103(b). A state can set a standard neither more nor less exacting. Arizona, of course, has not set any standard, let alone one that conflicts with the federal standard. Standing alone, § 1392(d) might not show a legislative intent to preempt only state-enacted regulatory safety standards. Arguably, it could have been construed to prohibit *any* form of state authority from interfering with the options permitted by federal law.[16]

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with common-law exceptions noted in other subsections); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (preempting "any and all State law," including "decisions, rules, regulations, or other State action having the effect of law").

[16] Even considering only the preemption clause, we do not believe such an analysis could survive *Cipollone*. Our reading of the preemption clause leads us to conclude that the legislative intent was to prohibit states from enacting any regulation that would conflict with the federal standards. It does not expressly preempt state courts from awarding tort damages for unreasonably defective designs, and therefore it would not preempt common-law tort claims.

Congress' inclusion of the savings clause unquestionably removes any doubt. The text of the savings clause explicitly shelters common-law claims from preemption, expansively providing that compliance with federal regulations "does not exempt [one] from *any* liability under common law." 15 U.S.C. § 1397(k) (codified as amended at 49 U.S.C. § 30103(e) (emphasis added). We find these words a reliably clear congressional mandate. The inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected preemption of state law tort claims like the one in this case. Finding preemption of this claim would violate the command of *Cipollone*. *See* 112 S. Ct. at 2618.

Thus, this case does not tempt us to speculate on unstated congressional intent or the Safety Act's implied preemptive reach. We conclude that common-law damage judgments are not preempted because (1) the text of the preemption clause addresses regulatory standards and does not reach or include common-law tort claims, and (2) the savings clause explicitly manifests a congressional intent to preserve common-law tort claims.[17] In addition, speculating that § 1392(d) might preclude conflicting common-law standards would effectively nullify the mandate that the Safety Act preempts no common-law liability. *United States v. Menasche*, 348 U.S. 528, 538-39, 75

[17] We reject the proposition that because the preemption clause makes no explicit reference to common-law claims, we are free to conclude that Congress meant to preempt them. On the contrary, the absence of a reference to common-law claims indicates that Congress did *not* intend preemption. We acknowledge that past decisions by the Supreme Court "have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 112 S. Ct. at 2620. But *Cipollone* admits that "the presumption against preemption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.* at 2620-21. We view the savings provision in the Safety Act as another good reason for construing the phrase narrowly in this case.

S. Ct. 513, 520 (1955) (courts have a duty to give effect to every clause in a statute, if possible).

Thus, our analysis of preemption by the Safety Act ends with a reading of the text of the preemption clause and its companion, the savings clause. The two clauses act harmoniously to forbid states from enacting conflicting standards while allowing common-law tort actions.[18] We believe *Cipollone* requires this result and are secure in the knowledge that our construction of this federal statute is not the last word.

CONCLUSION

The Safety Act does not preempt Plaintiff's action for defective design of a federally approved restraint system. The Safety Act's savings clause expresses Congress' intent to allow state common-law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers. Thus, the trial court erred in granting VW's motion for partial summary judgment. We vacate the order granting the motion and remand this case for further proceedings consistent with this opinion.

STANLEY G. FELDMAN
Chief Justice

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[18] Nor is such a result so unusual that one must conclude Congress could not have intended it. Indeed, it is the general rule of tort law that a design defect action is not precluded merely because the manufacturer complied with regulations. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

CONCURRING:

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

FREDERICK J. MARTONE
Justice

APPENDIX B

[Filed Apr. 20, 1993]

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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2 CA-SA 93-0046
Department A

PIMA County Superior Court Cause No. 274471

AMPARO HERNANDEZ-GOMEZ,
Petitioner,

v.

THE HONORABLE JOHN S. LEONARDO, A JUDGE FOR THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA,
Respondent,

and

VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION, and VOLKSWAGENWERK ANTIENGESELLSHAFT, A FOREIGN CORPORATION,
Real Parties in Interest.

ORDER

ORDERED: The court declines to accept jurisdiction.

Chief Judge Livermore and Judge Espinosa concurring.

DATED: April 20, 1993

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA
Presiding Judge

APPENDIX C

ARIZONA SUPERIOR COURT
PIMA COUNTY

Case No. 274471

Date: March 16, 1993

Judge: HON. JOHN S. LEONARDO

AMPARO HERNANDEZ-GOMEZ

vs.

VOLKSWAGEN OF AMERICA, INC., *et al.*

MINUTE ENTRY

UNDER ADVISEMENT RULING:

Defendants' Motion for Partial Summary Judgment is Granted to the extent that Plaintiff Hernandez-Gomez claims that the 1981 Volkswagen was defective because it did not have a lap belt installed as part of its passenger restraint system. This judgment is based on the Court's conclusion as a matter of law that:

1. The automatic restraint system (VWRA) in the 1981 VW complied with the Federal Motor Vehicle Safety Standards, particularly FMVSS 208 and 209, and that

2. Plaintiff's common law claim attempting to impose civil liability on VW based solely on the failure to provide a lap belt is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and its regulations. *Perry v. Mercedes Benz of North American, Inc.*, 957 F2d 1257 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F2d 1116 (3rd Cir. 1990).

Defendants' Motion for Partial Summary Judgment that Plaintiff's damages are to be measured at Mexican cost of care and services rather than at United States cost is Denied as the Court FINDS there exists a genuine issue as to material facts related to this motion. While there is uncertainty as to whether or not Plaintiff will ever be admitted as a resident of this country on a permanent basis, she has obtained medical treatment in this country on a regular basis since the injury and, given the proximity of her residence in Mexico to the border, it is reasonable to expect that she will continue to receive treatment in the United States indefinitely even if she continues to reside in Mexico.

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FILED
MAR 15 1995
OFFICE OF THE CLERK

No. 94-1305

In The

Supreme Court of the United States

October Term, 1994

Volkswagen of America, Inc. and
Volkswagenwerk Aktiengesellschaft,

Petitioners,

v.

Amparo Hernandez-Gomez,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court erred in unanimously ruling that the Safety Act (15 U.S.C. § 1381, *et seq.*) does not preempt the common law claim of Respondent Amparo Hernandez-Gomez against Petitioners when:

1) Respondent's claim does not conflict with Federal Motor Vehicle Safety Standard 208;

2) Respondent's claim does not conflict with any decision of a United States court of appeals that has been decided since *Cipollone v. Liggett Meyers, Inc.*, 112 S. Ct. 2608 (1992), or with any decision of a state court of last resort;

3) The Safety Act contains an express anti-preemption provision – 15 U.S.C. § 1397(k).

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STATEMENT OF THE CASE[1]

On November 6, 1988, Respondent was riding in the right front seat of a 1981 Volkswagen Rabbit. (App., 2a). The restraint system for Respondent's seat consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. (App., 2a). The system did not include a lap belt. (App., 2a).

Respondent was wearing the shoulder belt for her seat position. (PA, Tab 3). The driver briefly took his eyes off the road. The car veered off the road, ran down an embankment, struck a drainage culvert, turned over and landed on its roof. The shoulder belt failed to restrain Respondent in her seat and her head and shoulders smashed against the car's roof causing a spinal cord injury that has left her paraplegic. (App. 2a).

On October 31, 1990, Respondent filed suit against VW in Arizona Superior Court (PA, Tab 1). She alleged, under theories of negligence and strict liability in tort, that the car was in a defective condition unreasonably dangerous due to the lack of an adequate occupant

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[1] Respondent Amparo Hernandez-Gomez will be referred to as "Respondent". Petitioners Volkswagen of America, Inc. and Volkswagenwerk Aktiengesellschaft will be referred to collectively as "VW". "PA" refers to the Appendix to Petition for Review filed with the Arizona Supreme Court. "P" refers to the Petition for Review filed with the Arizona Supreme Court. "App" refers to the Appendix to VW's Petition For A Writ Of Certiorari.

restraint system to hold an occupant such as Respondent in her seat during a foreseeable rollover and that she suffered enhanced injuries, including the spinal cord injury, as a result of design defects in the occupant restraint system. (PA, Tabs 1, 4). Respondent also alleged that the lack of lap belts for the front seats was a primary defect in the car's occupant restraint system. (PA, Tab 4).

On January 15, 1993, VW filed a Motion For Partial Summary Judgment Re: Failure To Install Lap Belt. (PA, Tab 6). VW argued in its Motion: a) that it was entitled to summary judgment on the issue of whether the car should have included lap belts for the front seats because Federal Motor Vehicle Safety Standard (hereafter "FMVSS") 208 established the standard for occupant protection which VW was required to meet; b) that the occupant restraint system in the car complied with option two of FMVSS 208, c) that FMVSS 208 did not require VW to include lap belts for the front seats; and d) that federal law (15 U.S.C. § 1381, *et seq.*, hereafter the "Safety Act")[2] and regulations (FMVSS 208) either expressly or impliedly preempted Respondent's common law product liability claim against VW based on the lack of lap belts for the front seats. (PA, Tab 6).

Respondent contended in her Response to the Motion: a) that her product liability claim against VW was not expressly or impliedly preempted in any manner by the Safety Act and/or FMVSS 208; b) that, in fact, there is a specific savings provision in the Safety Act, 15

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[2] Congress recodified the Safety Act at 49 U.S.C. §§ 30101-30169, effective July 5, 1994. References to the Safety Act in this brief are to the prior sections and language.

U.S.C. § 1397(k), which preserved her claim; c) that *Cipollone v. Liggett Meyers, Inc.*, 112 S. Ct. 2608 (1992), holds that where there are provisions in a Congressional act relating to preemption a court may not proceed to find implied preemption beyond the scope of those provisions; and d) that in this case because there are preemption provisions in the Safety Act, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), which define the scope of preemption, the trial court may not look any further or find implied preemption. (PA, Tab 7).

The trial court issued a minute entry order dated March 16, 1993, holding that "Plaintiff's common law claim attempting to impose civil liability on VW based solely on the failure to provide a lap belt is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and its regulations. *Perry v. Mercedes Benz of North America, Inc.* 957 F.2d 1257 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d. 1116 (3rd Cir. 1990)." (App., 21a).

On April 8, 1993, Respondent filed a Petition for Special Action with the Arizona Court of Appeals, Division Two, asking that the Court of Appeals reverse the trial court's minute entry order granting the Motion For Partial Summary Judgment Re: Failure To Install Lap Belt. (P. 2). On April 20, 1993, the Court of Appeals issued an order declining to accept jurisdiction. (App., 20a).

On May 20, 1993, Respondent filed a Petition For Review with the Arizona Supreme Court. On December 16, 1993, the Arizona Supreme Court granted the Petition For Review and issued its opinion on November 1, 1994, reversing the judgment of the trial court.

REASONS WHY THE PETITION SHOULD BE DENIED

VW has mischaracterized Respondent's claim in an effort to gain certiorari review. Respondent's claim is that the 1981 Volkswagen Rabbit is defective and unreasonably dangerous because its occupant restraint system fails to provide adequate restraint in rollover accidents. 15 U.S.C. § 1410b(f)(3) defines occupant restraint system as follows: "The term occupant restraint system means a system the principle purpose of which is to assure the occupants of a motor vehicle remain in their seats in the event of collision or rollover . . . "

FMVSS 208 specifies "equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208 S.2. A car manufacturer is permitted to comply with FMVSS 208 equipment requirements by choosing one of three options. VW claims that its two point passive restraint system complies with option two of 208 which is set forth in 49 C.F.R. § 571.208 S.4.1.2.2. VW's Motion For Partial Summary Judgment Re: Failure To Install Lap Belt was based on the argument that Respondent's claim that the 1981 Volkswagen Rabbit was defective because it did not include lap belts for the front seats was preempted by the Safety Act and FMVSS 208 because of VW's compliance with option two of FMVSS 208 which VW claims permitted the use of passive shoulder belts without lap belts.

Respondent does not contend that VW should have selected one FMVSS 208 option over another. VW included the two point passive restraint system in 1975 through 1989 model year VW vehicles. Prior to introducing the two point passive restraint system in the 1975

model year, VW asked NHTSA whether an active lap belt could be added to the system. (PA, Tab 9.) NHTSA told VW that it could include an active lap belt in cars equipped with the two point passive restraint system. (PA, Tab 10.) NHTSA made it clear to VW that FMVSS 208 is a minimum standard and that a manufacturer may include additional safety belts over and above what is required to comply with the minimum requirements of the standard. (PA, Tab 10.) Starting in the 1990 model year VW included active lap belts in its vehicles equipped with the two point passive restraint system. (PA, Tab 11.)

The fact that VW decided "to meet only the bare minimum performance requirements" of FMVSS 208 with its two point passive restraint system does not relieve it of tort liability for design defects in that system separate and apart from the minimum performance requirements. *Perry*, 957 F.2d at 1265.

VW made a choice in deciding not to include active lap belts in cars equipped with its two point passive restraint system. The effect of state tort law on VW's design decision is indirect. VW could have included active lap belts in cars equipped with its two point passive restraint system, thereby avoiding design defect claims based on the lack of adequate restraint in rollover accidents. The concurring opinion of Justice Blackmun in *Cipollone* explains how state tort law does not conflict with a federal regulatory scheme like the Safety Act in this type of situation.

> The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from

> positive enactments such as statutes and administrative regulations. Moreover, tort law has an entirely separate function – compensating victims – that sets it apart from direct forms of regulation. (citation omitted).

Cipollone, 112 S. Ct. at 2628, concurring opinion of Justice Blackmun. *Also see, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1062 (1985); *Gingold v. Audi-NSU-Auto Union, AG*, 567 A.2d 312, 321-23 (Pa. Super. 1989).

State regulation of safety and health matters is different than the incidental regulatory effects of damages awarded for injuries. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988). Congress may determine that the indirect regulatory pressure of state tort law is acceptable. *Cipollone*, 112 S. Ct. at 2629, citing *Silkwood*, 464 U.S. at 256. The inclusion of 15 U.S.C. § 1397(k) in the Safety Act indicates that Congress reasonably determined that the incidental regulatory pressure of state common law on auto manufacturers was acceptable and desirable. State tort law is "neither direct nor substantial enough to warrant preemption" in this case. *Cipollone*, 112 S. Ct. at 2629, citing *English v. General Electric Company*, 496 U.S. 72 (1990).

The legal duty that is the predicate of Respondent's common law claim in this case is the duty to use reasonable care in designing a product and/or to design a product that is not in a defective condition unreasonably dangerous to a user. *Rossell v. Volkswagen*, 147 Ariz. 160, 709 P.2d 517 (1985); *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 400, 737 P.2d 376 (1987). These duties do not

constitute minimum *performance* standards for motor vehicles as contemplated by the Safety Act. The facts of each case are applied to the duties to determine if there has been a breach. If there has been a breach and injury has occurred as a result of the breach, then the manufacturer is liable and must compensate the injured person. There is no conflict between Congress' objectives regarding the Safety Act and common law tort liability for failing to design an occupant restraint system to perform in a manner "that effectively exceeds the federal minimum standards." *Perry*, 957 F.2d at 1264.

The Arizona Supreme Court correctly followed *Cipollone* in finding that Respondent's design defect claim against VW is not preempted by the Safety Act and that the savings clause (15 U.S.C. § 1397(k) "expresses Congress' intent to allow state common law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers." (App., 18a).

In following *Cipollone*, the Arizona Supreme Court relied not only on *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), cert. granted, 115 S. Ct. 306 (1994), but also on cases from other federal circuits which have addressed federal preemption since *Cipollone* and which "consider expression of preemption in a statute's text the 'reliable indicium of congressional intent'." *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 345, 358 (8th Cir. 1993); *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2nd Cir. 1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447

(10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 86 (1993); *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

VW's petition does not satisfy the considerations governing review on writ of certiorari set forth in Sup. Ct. R. 10. The opinion of the Arizona Supreme Court does not conflict with *Cipollone*, with any decision of a United States court of appeals that has been decided since *Cipollone* or with any decision of a state court of last resort. Accordingly, this Court should deny review because VW's petition fails to satisfy the considerations set forth in Sup. Ct. R. 10.

The opinion of the Arizona Supreme Court involves the trial court's ruling on a *partial* motion for summary judgment. VW's petition is premature. A trial on the merits before a jury may result in the case being decided on issues other than the one raised by VW in its petition. Respondent has been waiting for over four (4) years to have her case decided on the merits. Therefore, this Court should deny the petition thereby permitting the case to proceed to trial without further delay.

Freightliner Corp. v. Myrick, No. 94-286, involves FMVSS 121 and the issue of whether manufacturers have an option under that standard to install anti-lock brakes. This case involves FMVSS 208 and the issue of whether the 1981 Volkswagen Rabbit was defective and unreasonably dangerous because it failed to provide adequate occupant restraint in the rollover accident. Thus, this

Court's disposition of *Freightliner Corp. v. Myrick*, No. 94-286, is not relevant to VW's petition and the petition should be denied immediately.

VW claims at p. 15 of its petition that 15 U.S.C. 1392(d) does not describe the state authority Congress intended to displace. VW cites no legal authority in support of the argument. More importantly, the argument is contrary to the plain language of the statute. As the Arizona Supreme Court explained in its opinion, the text of 15 U.S.C. § 1392(d) "expressly precludes any state from establishing, or prescribing, a safety standard not identical to the same aspect of performance targeted by a federal standard." (App., 16a).

VW's next argument at pp. 15-16 of its petition that 15 U.S.C. § 1392(d) "does not provide a 'reliable indicium' of Congress's preemptive intent because it does not reflect all of the available evidence of Congress's thinking" is equally weak. The sole stated purpose of Congress in enacting the Safety Act on September 9, 1966, was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Safety Act requires that the Department of Transportation promulgate "Federal Motor Vehicle Safety Standards (FMVSS)" which are to be "*minimum*" standards for motor vehicle performance or motor vehicle equipment performance . . . " 15 U.S.C. § 1391(2) (emphasis added). When Congress enacted the Safety Act, it was fully aware that it was legislating in an area previously governed only by state law. For that reason, Congress explicitly addressed what it *did* and *did not* intend to preempt in two separate sections of the Safety Act.

The first section, 15 U.S.C. § 1392(d), explained the preemptive effect that Congress intended the Federal Motor Vehicle Safety Standards to have on state and local safety standards. The second section, 15 U.S.C. § 1397(k), explained the effect that Congress intended the Federal Motor Vehicle Safety Standards to have on common law claims. Given the unequivocal language of these two sections, Congress' intent is clear. Section 1392(d) preempts state and local standards governing the same aspect of performance as federal standards, and § 1397(k) expressly preserves all common law claims. Section 1392(d) has nothing to do with common law claims; it applies to "state standards."

The legislative history of the Safety Act confirms the clear and explicit intention of Congress not to preempt common law claims. The Senate's version of the proposed Safety Act did not contain § 1397(k), but did contain § 1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. The Report stated: "The federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2720.

The Senate Committee Report was not good enough to the House of Representatives so it added § 1397(k). The House Committee Report states:

> *Common law liability* – 108(c) of the reported bill [15 U.S.C. § 1397(k)] provides that compliance with any federal motor vehicle safety standard

> does not exempt a person from any liability under common law.
>
> *It is intended,* and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law* particularly those relating to warranty, contract, and *tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

The statements of individual Congressmen were equally certain: "[C]ompliance with Federal standards does not exempt any person from common law liability." 112 Cong.Rec. 21,487 (remark of Sen. Magnusson).

The legislative history of 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) and the plain and explicit language of those sections indicate: 1) Congress considered the issue of preemption; 2) Congress included a provision explicitly addressing the issue of preemption in the Safety Act: and 3) The provision included in the Safety Act by Congress (15 U.S.C. § 1397(k)) "provides a 'reliable indicium of Congressional intent with respect to state authority,' *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S. Ct., at 1190, . . . " *Cipollone,* 112 S. Ct. at 2618. Accordingly " 'there is no need to infer Congressional intent to preempt state laws from the substantive provisions' of the legislation. (citation omitted)." *Id.* at 2618. 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) define the preemptive reach of the Safety Act. Thus, there is an implication "that matters beyond that reach are not preempted." *Id.* at 2618.

Cipollone definitively establishes that a court may not, "absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language." (Footnote omitted) *Id.* at 2626. The language of 15 U.S.C. § 1397(k) is unambiguous that "any person" is not exempted "from any liability under common law" by complying "with any motor vehicle safety standard issued under this subchapter."

There is no authority to support VW's argument at p. 16 of its petition that the savings clause, 15 U.S.C. § 1397(k), was added "to prevent implied field preemption from entirely displacing state law." On the other hand, in *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 812-13 (1987), even though the Court found that the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, precluded "a court from applying the law of an affected State against an out-of-state source", it also found that a general savings clause specifically preserved other common law actions that did not interfere with the achievement of the "full purposes and objectives of Congress." *Id.* at 812, 814. Design defect claims do not interfere with Congress's intent regarding the Safety Act. They are consistent with the intent of Congress in encouraging safety.

VW's claim at p. 16 of its petition "that Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles" is just not true. When Congress enacted Pub.L. 102-240, § 2508(d), it included a savings clause preserving the liability of motor vehicle manufacturers under applicable law. The text reads as follows:

> "Nothing in this section or in the amendments made under this section to Federal Motor Vehicle Safety Standard 208 shall be construed by any person or court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." Pub.L. 102-240, § 2508(d).

15 U.S.C. § 1397(k) and Pub.L. 102-240, § 2508(d) are both savings clauses that preserve manufacturer liability. They both make perfect sense. Automotive safety technology advances more rapidly than Federal Motor Vehicle Safety Standard rule making. Thus, Congress recognized that even though a manufacturer may comply with the minimum performance standard established by FMVSS 208, a vehicle may be defective because it does not incorporate technological advancements that have occurred since the latest NHTSA rule making or Congressional action. The savings clause protects individuals who are injured by defects in vehicles that meet the minimum performance standard and provides incentive to manufacturers to include safety advancements in their vehicles.

Another reason for the savings clause is that a manufacturer also may come into possession of information about the operation or maintenance of occupant protection systems in its vehicles, the non-disclosure of which renders the vehicle defective. The savings clause provides motivation for the manufacturer to disclose such information to the consumer in a timely manner and protection for the consumer who is injured as a result of not receiving the information.

The fact that in 1991 Congress enacted another savings clause as a part of a statute requiring amendments to Federal Motor Vehicle Safety Standard 208, reaffirms the original intention of Congress when it enacted the Safety Act to preserve the right of individuals to pursue actions for damages against motor vehicle manufacturers.

Contrary to VW's assertions at p. 16 of its petition, H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1783, shows that Congress did not want to change existing liability law by the adoption of Pub.L. 102-240, § 2508(d).

> With respect to subsection (d), the Conferees, noting NHTSA's letter of November 7, 1991, do not want by this section to change the law on liability as it existed prior to enactment. This section is not intended to be a "sword" or a "shield" in litigation or otherwise.

1991 U.S.C.C.A.N. 1783.

VW is wrong in claiming at p. 17 of its petition that the Arizona Supreme Court held that 15 U.S.C. § 1392(d) does not expressly preempt common law claims because there is no mention of such claims in the subsection. What the Arizona Supreme Court actually held is that when 15 U.S.C. § 1392(d) is read with the savings clause, 15 U.S.C. § 1397(k), "[t]he inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected preemption of state tort law claims like the one in this case." (App., 17a). In footnote 17 of its opinion, the Arizona Supreme Court discussed the fact that 15 U.S.C. § 1392(d) does not mention common law claims and noted that: a) the absence of

mention did not permit the court to conclude that Congress intended to preempt such claims; b) on the contrary, the absence of mention indicates "that Congress did not intend preemption"; c) *Cipollone* recognizes that the phrase 'state law' includes common law; d) *Cipollone* also recognizes that "the presumption against preemption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context"; and e) the "savings provision in the Safety Act" is "another good reason for construing the phrase narrowly in this case". (App., 17a n.17).

In *Cipollone* this Court considered the fact that Congress did not expressly include common law within the pre-emptive reach of § 5(b) of the Public Health Cigarette Smoking Act of 1969 (15 U.S.C. § 1334(b)), as it has in other statutes and "the fact that Congress did not include a savings clause preserving common law claims, again, as it has in other statutes." *Id.* at 2621, n. 22. The Court concluded:

> "Under our analysis of § 5, these omissions make perfect sense: Congress was neither pre-empting nor saving common law as a whole – it was simply pre-empting particular common law claims, while saving others."

Id. at 2621, n. 22.

The Safety Act (15 U.S.C. § 1381, *et seq.*) includes a savings clause – 15 U.S.C. § 1397(k). Therefore, under the *Cipollone* analysis, the inclusion of the savings clause in the Safety Act evidences the intent of Congress to save "common law claims as a whole."

VW cites no authority to support its claim at pp. 17-18 of its petition that 15 U.S.C. § 1397(k) "negates only as an affirmative common-law defense of compliance with a government standard." *Taylor v. General Motors Co.*, 875 F.2d 816, 824 (11th Cir. 1989), correctly rejected the same argument reasoning that such a construction would make the savings clause redundant because the pre-emption clause "provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not pre-empted." The adoption of VW's argument would render § 1397(k) "superfluous". *Id.*

The savings clause, 15 U.S.C. § 1397(k), does not "subvert" the federal regulatory scheme. Rather, the savings clause expresses the intent of Congress that the right of consumers to bring common law actions to recover for product defects should be preserved because such actions encourage manufacturers to make safer vehicles thereby promoting the primary purpose of the Safety Act.

CONCLUSION

The Arizona Supreme Court correctly followed *Cipollone* in rendering its opinion. For the above reasons, VW's petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

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Respondent has presented no credible argument why this case should not be held for review pending the disposition by this Court of *Myrick* v. *Fruehauf Corp.*, 13 F.3d 1516 (11th Cir.), cert. granted, 115 S. Ct. 306 (1994) (No. 94-286).

1. The question presented in this case is, at bottom, the same as the question presented in *Myrick*. Although respondent argues (Br. in Opp. 4) that "VW has mischaracterized Respondent's claim in an effort to gain certiorari review," the central thrust of respondent's opposition to VW's preemption defense in the courts below was "that *Cipollone* v. *Liggett Meyers, Inc.* [sic], 112 S. Ct. 2608 (1992), holds that where there are provisions in a

Congressional act relating to preemption a court may not proceed to find implied preemption beyond the scope of those provisions." Br. in Opp. 3.[1] Indeed, the Arizona Supreme Court's decision in this case was premised on its view that "the Supreme Court's decision in *Cipollone* casts an entirely different light on the issue of preemption." Pet. App. 11a. The Arizona Supreme Court stated that, but for the *Cipollone* decision, it "might have been constrained to adopt the view of the federal courts and find implied preemption." *Ibid.*

Whether, in fact, *Cipollone* repudiated a long line of preemption decisions and radically transformed federal preemption law to preclude implied preemption when there is an express preemption clause in a statute is the question presented in *Myrick*. See Pet. for Cert. i (whether the Safety Act "preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone* * * * forecloses such preemption"). The Eleventh Circuit in *Myrick* held that *Cipollone* was a dramatic departure from established federal preemption law. And, contrary to respondent's suggestion (Br. in Opp. 7), the *Myrick* decision plainly was a "[s]ignificant[]" factor in the Arizona Supreme Court's decision. Pet. App. 13a.

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[1] Respondent asserts without explanation (Br. in Opp. 8-9) that VW's petition should be denied because this case involves FMVSS 208 and *Myrick* involves FMVSS 121. As VW explained in its petition for certiorari (at 20-21), the differences between those standards are not relevant for purposes of deciding the general principles of federal preemption law presented in this case and in *Myrick*. In any event, if anything this is a stronger case for preemption than *Myrick*. See *Myrick*, U.S. Br. 24-29; *Myrick*, Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers as *Amici Curiae* in Support of Petitioners.

2. In an effort to suggest that there is no conflict between the tort claim in this case and FMVSS 208, respondent asserts that she "does not contend that VW should have selected one FMVSS 208 option over another." Br. in Opp. 4-5. Yet by claiming that a manually activated belt should have been added to a totally passive restraint system, that is precisely what respondent argues in support of her tort claim.

As VW explained in its petition for certiorari (at 6-7), FMVSS 208 gave it a choice whether to install a passive seat belt assembly (49 C.F.R. § 571.208, S4.5.3) or an active lap and shoulder belt system (*id.* at § 571.208, S4.1.2.3). Even respondent states expressly (Br. in Opp. 5 (emphasis added)) that "VW made a *choice* in deciding not to include active lap belts in cars equipped with its two point passive restraint system," and — because of that *choice* by VW, which was clearly and explicitly authorized by federal law — respondent seeks to impose tort liability. Thus, respondent plainly contends that VW should have selected "one FMVSS 208 option over another." Br. in Opp. 4. Imposing tort liability for the exercise of a federal safety design option creates a clear conflict with federal law in violation of the Supremacy Clause. See Pet. 13-14.

3. Respondent also claims that NHTSA has interpreted FMVSS 208 to establish only "'bare minimum performance standards,'" which VW was free to supplement with "additional safety belts," and that liability can be imposed under state law based on the failure to install "additional safety belts." Br. in Opp. 5 (quoting *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992)).

This conclusory argument boils down to a claim that one of the safety options authorized under FMVSS 208 was not, in fact, safe — despite the expert judgment of NHTSA to the contrary. As the government argued to this Court in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065

(1989), NHTSA promulgated FMVSS 208 to grant manufacturers several design options from which to choose a safety restraint system. U.S. Br. 12, 15; see also Pet. 6-7, 11-12. For each option, FMVSS 208 specified "minimum performance requirements." *Perry*, 957 F.2d at 1265. For example, if a manufacturer chooses to install an airbag system in its vehicles, FMVSS 208 establishes "minimum" performance requirements. *Ibid.*

Respondent does not contend, however, that the passive restraint system selected by VW did not perform as expected and required by FMVSS 208. Rather, respondent objects to the basic choice made by VW under FMVSS 208 to install a passive system at all. This is a crucial distinction that was drawn by the court in *Perry*, which noted that after a choice was made about a restraint system, "tort liability for the design of that system would not remove or require any particular choice, or otherwise frustrate 'flexibility' that the federal scheme provides." 957 F.2d at 1265. Respondent in this case, however, seeks to frustrate the federal scheme by challenging the very choice offered by FMVSS 208.

Moreover, even if respondent's claim were directed at the performance standards of passive restraint systems under FMVSS 208, rather than the design choice itself, those standards are the "legal minimum" required — not, as respondent suggests (Br. in Opp. 5), substantively *minimal*. Even the most onerous performance requirement would constitute a legal "minimum." As NHTSA has stated (41 Fed. Reg. 2391, 2392 (1976)):

> "[m]inimum" performance standards do not equate with "minimal" performance standards * * *. The word "minimum" in the statutory definition of motor vehicle safety standards * * * does not refer to the substantive content of the standards but rather to their legal status — that the products covered must not fall short of them.

In any event, the statutory term "minimum" does not change the preemptive effect of the statute or regulations. *Wood* v. *General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) ("[a]lthough the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law").

4. In the final analysis, the bulk of respondent's brief in opposition is devoted to a discussion of general issues of federal preemption under the Safety Act after *Cipollone*, which will be decided by this Court in *Myrick*. This case should, therefore, be held for that decision.

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The petition in this case challenges a decision of the Supreme Court of Arizona holding that respondent's common law tort claim is not preempted by federal law. Specifically, the petition explains that respondent's contention that her automobile was defective under state law because it was not equipped with a manually activated lap belt is preempted by Federal Motor Vehicle Safety Standard 208, which gave petitioners an option, for safety reasons, *not* to install manual seat belts in the car. Because of the similarity between this issue and the questions presented in *Freightliner Corp.* v. *Myrick*, No. 94-286, we suggested that the Court hold this petition and dispose of it as appropriate in light of the decision in *Myrick*.

The Court has now decided *Myrick*, and that decision confirms that the petition in this case should be granted.

1. The Court granted certiorari in *Myrick* to review the Eleventh Circuit's decision that implied preemption is no longer available under the Safety Act because the Act contains an express preemption provision. In the Eleventh Circuit's view, this Court held in *Cipollone* that the implied preemption doctrine does not apply in cases involving federal statutes that have express preemption clauses. 13 F.3d at 1522. In this case, the Arizona Supreme Court declined to reach petitioners' implied preemption claim for precisely the same reason. Relying on the Eleventh Circuit's decision in *Myrick*, the court below held that "when the statute addresses preemption, its text defines preemptive reach and 'implies that matters beyond that reach are not preempted.'" Pet. App. 15a, quoting *Cipollone*, 112 S. Ct. at 2618.

This Court's decision in *Myrick* thoroughly repudiated the Eleventh Circuit's (and the Arizona Supreme Court's) strained reading of *Cipollone*. The Court held — unequivocally and without dissent — that the mere presence of an express preemption clause does *not* "obviate the need for analysis of an individual statute's [implied] pre-emptive effects." Slip op. 8. As the Court stated, "that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Ibid.*

Accordingly, the Arizona Supreme Court was plainly wrong in reversing the decision of the Arizona Superior Court, which found respondent's claims to be impliedly preempted (Pet. App. 21a), on the ground that, in light of "'*Cipollone*'s clear instruction,'" it could not even "'consider implied preemption.'" *Id.* at 15a, quoting *Myrick*, 13 F.3d at 1522. Therefore, petitioners are entitled to have the judgment of the Arizona Supreme Court vacated and the case remanded for reconsideration of the preemption issue in view

of this Court's contrary decision in *Myrick*. Indeed, the Arizona Supreme Court itself stated that, had it not been for *Cipollone*, it "might have been constrained to adopt the view of the federal courts and find implied preemption" here. Pet. App. 11a. Now that this Court has firmly rejected the reading of *Cipollone* adopted by the court below, a remand is plainly in order.

2. The disposition we urge is fully in accord with the view of NHTSA, the expert federal agency concerned with motor vehicle safety. The Solicitor General argued that the preemption claims in *Myrick* should be rejected because, as the Court ultimately held, "there [is] no federal safety standard established under the Safety Act 'in effect' with regard to [ABS devices] (the relevant 'item of equipment') in trucks and trailers." *Myrick* U.S. Br. 11. By contrast, the Solicitor General distinguished cases, such as this one, arising under FMVSS 208, on the ground that state-mandated restraint devices "would have frustrated the Secretary's policy judgment [under FMVSS 208] and would have had an adverse effect on safety" (*Myrick* U.S. Br. 28). Thus, it is essential that the Court not allow the Arizona Supreme Court's preemption ruling, based on a rationale that is "without merit" (*Myrick*, slip op. 7), to remain standing.

In sum, this Court should grant certiorari, vacate the judgment below and remand for reconsideration of petitioners' preemption claim in light of the decision in *Myrick*.

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